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Interest Analysis and Divorce Actions

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INTEREST ANALYSIS AND DIVORCE ACTIONS

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ONE of the most dramatic changes in conflicts law[1] in the past decade has been the shift away from the mechanical application of rigid indicative laws[2] used to resolve choice-of-law problems toward an interest analysis method of fashioning indicative laws to resolve such problems.[3] Less dramatic, perhaps because it has evolved over a greater period of time, has been the continuing enlargement of the jurisdiction made available to courts over nonresident defendants.[4] Both of these developments uniquely coincide in various aspects of divorce litigation and raise these questions: To what extent may a court assert jurisdiction to hear and determine a divorce action? To what extent may a court assert jurisdiction to hear and determine the issue of permanent alimony incident to a divorce action? To what body of dispositive

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1. The author subscribes to the view of Professor Leflar that the "mild break with the past" manifested by using "the vernacular 'Conflicts' " instead of "the traditional term Conflict of Laws" is consistent with "a recognition that the law requires both new language and new analysis if it is to be described, or explained, in realistic fashion." R. LEFLAR, AMERICAN CONFLICTS LAW v (1968).

2. The phrase *indicative law* is intended to refer to "those rules which indicate the system of dispositive rules which is to be applied." Taintor, *Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam,* 8 U. PITT. L. REV. 223, 233 n.58 (1942). It is the author's belief that indicative law is simpler and no less descriptive than such phrases as "conflict-of-laws laws" or "conflict-of-laws rules." When a court utilizing interest analysis finds itself confronted with a choice-of-law problem wherein State A and State B, as the "competing" states, both have legitimate interests in the particular issue, it is the indicative law fashioned by the forum which will indicate whether State A's local law or State B's local law will be applied to resolve the issue.

3. *See, e.g.,* Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970) (and *Symposium on Cipolla v. Shaposka—An Application of "Interest Analysis,"* 9 DUQUESNE L. REV. 347 (1971)); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Reich v. Purcell, 67 Cal. 2d. 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (*and Comments on Reich v. Purcell,* 15 U.C.L.A.L. Rev. 552 (1968)); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (*Clark's* use of the "better rule of law" is discussed in Seidelson, *Comment on Cipolla v. Shaposka,* 9 DUQUESNE L. REV. 423, 428 (1971)); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963) (*Thompson* and *Clark* and their chronological significance are discussed in Seidelson, *The Americanization of Renvoi,* 7 DUQUESNE L. REV. 201, 217 (1969)); Marra v. Bushee, 317 F. Supp. 972 (D. Vt. 1970).

4. *See, e.g.,* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. State of Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawloski, 274 U.S. 352 (1927).

law[5] should a court refer in determining the grounds available for divorce? And, finally, to what body of dispositive law should a court refer in determining the propriety and amount of permanent alimony?

Conventional wisdom and a line of judicial decisions[6] indicate that the basic jurisdictional requirement in a divorce action is domicile. Minimally, plaintiff's domicile in the forum state is adequate to give the court jurisdiction to hear and determine the divorce action, provided that the nonresident defendant is given a form of constructive service reasonably calculated to provide actual notice of the action and an opportunity to defend.[7] Absent an appearance by such a nonresident defendant, however, the forum is precluded from making a determination of permanent alimony which will be binding on the defendant.[8] When analyzed, each of those jurisdictional conclusions can be seen as the product of interest analysis, even though the conclusions were achieved long before the dramatic shift to interest analysis in resolving choice-of-law problems occurred, and even before "interest analysis" came to be a recognized term of legal art.

Domicile became the sine qua non of divorce jurisdiction because of judicial recognition of the legitimate interest which each state has in the marital status of its domiciliaries. Plaintiff's domicile in the forum state was recognized as sufficient to provide the forum with jurisdiction to hear and determine a divorce action there instituted for the same reason: the forum's legitimate interest in the marital status of its plaintiff domiciliary. The conclusion

5. The phrase *dispositive law* is intended to refer to "those rules of law which are used to determine the nature of rights arising from a fact-group, *i.e.*, those which dispose of a claim." Taintor, *supra* note 2, at 233 n.58. It is the author's view that dispositive law is more descriptive and useful than such phrases as "municipal law" or "internal law." The author is indebted to the late Charles W. Taintor II for creation of the phrases indicative law and dispositive law. When a court utilizing interest analysis resolves a choice-of-law problem wherein State A and State B, as the "competing" states, both have legitimate interests in the particular issue, by determining that State A's interests are superior, the forum will resolve or dispose of the issue by the application of State A's dispositive law.

6. Sherrer v. Sherrer, 334 U.S. 343 (1948); William v. North Carolina, 325 U.S. 226 (1945) [hereinafter referred to as Williams II]; Williams v. North Carolina, 317 U.S. 287 (1942) [hereinafter referred to as Williams I]; Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948); Voss v. Voss, 5 N.J. 402, 75 A.2d 889 (1950). *But see* Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959), where a residence imposed by military orders was deemed an adequate substitute for domicile.

7. *See* cases cited in *supra* note 6.

8. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

was often stated in terms of a quasi in rem jurisdiction.[9] Analogizing the marital status with a res, courts stated that plaintiff's domicile in the forum state at the time of instituting the divorce action had the effect of placing the marital status (res) before the court, thus authorizing the court to assert (in rem) jurisdiction over the status. That jurisdiction permitted the court to operate upon or terminate the marital status of the plaintiff. Since a necessary concomitant of such termination was termination of the marital status of the defendant, that jurisdiction was found to exist, so long as defendant was given a constitutionally appropriate mode of constructive service. An unfortunate consequence of the analogy between the marital status and a res was the concept of "divisible divorce."[10] A court acknowledged to have jurisdiction to terminate the marital status because of plaintiff's domicile in the forum plus constructive service on the nonresident defendant, was deemed to lack jurisdiction to enter an alimony order which would be binding upon such defendant.[11] The reason? The court's jurisdiction was limited to the res before it (the marital status) and could not be enlarged to an in personam jurisdiction over the nonresident defendant given only constructive service. The in rem jurisdiction would not justify binding the defendant "personally." The unstated premise was that termination of the marriage by a divorce decree did not improperly affect the defendant "personally." As a result, the forum at plaintiff's domicile could enter a divorce decree entitled to full faith and credit[12] in every sister state (including the domicile of defendant) but its alimony order was not binding upon the defendant in any sister state, unless the nonresident had entered an appearance in the divorce action.

In addition there remained the question of the validity of the forum's determination that plaintiff was domiciled in the forum state. Absent either domestic personal service on, or the entry of an appearance by, the nonresident defendant, the forum's conclusion that plaintiff was domiciled in the forum state at the time the action was initiated was subject to collateral attack by

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9. *See* cases cited in *supra* note 6.

10. Vanderbilt v. Vanderbilt, 354 U.S. 416, 424 (1957) (Frankfurter, J., dissenting).

11. *See* cases cited in *supra* note 8.

12. Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948).

the defendant in the courts of sister states.[13] Consequently, even the forum's divorce decree was a less than certain conclusion that the marriage had been terminated.

Both of those legal doctrines—"divisible divorce" and collateral attack upon the forum's determination of domicile—can be characterized as conclusions resting upon an early form of interest analysis. If Nevada could not bind a New York wife by a Nevada alimony decree, it was probably because of New York's legitimate interest in the economic integrity of its domiciliary.[14] And if a North Carolina court was free to make independent inquiry into a Nevada determination of domicile, it was probably because of North Carolina's interest in the marital status of its domiciliary.[15]

It would appear then that much of the existing law staking out the perimeters of the jurisdiction available to a court to enter a divorce decree or an alimony order or both is explicable in terms of an early and not unexpectedly primitive form of interest analysis. What remains to be determined is whether or not, and if so to what extent, a more refined application of interest analysis, complemented by an expanding view of jurisdiction generally, can be utilized to achieve a more reasoned and palatable determination of such available jurisdiction. At least two aspects of the existing state of the law appear unsatisfactory: (1) a court may be deemed to have appropriate jurisdiction over the marital status, yet be found without jurisdiction over one incident of that status, alimony, and (2) a court's determination of domicile, as a condition precedent to finding jurisdiction over the marital status, is subject to redetermination by other courts. Consequently, neither the alimony order nor the basic divorce decree is assured of receiving full faith and credit if the nonresident defendant simply ignores the divorce proceedings.

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13. *Williams* I, 317 U.S. at 291. It has long been the author's view that re-examination of Nevada's determination of domicile in the *Williams* cases would have been appropriate even if the divorce-action defendants had appeared in the Nevada divorce suits, since North Carolina had an independent sovereign right to determine if a crime (bigamous cohabitation) had been committed within its borders. Seidelson, *The Full Faith and Credit Clause: An Instrument for Resolution of Intranational Conflicts Problems*, 32 GEO. WASH. L. REV. 554, 571-76 (1964). For a more restrictive view of North Carolina's interest in the cases, *see* Corwin, *Out-Haddocking Haddock*, 93 U. PA. L. REV. 341 (1945).

14. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541, 547 (1948).

15. *Williams* II, 325 U.S. at 232.

Even the most sophisticated application of interest analysis could be expected to lead to the conclusion that a court in the state of plaintiff's domicile should have jurisdiction over the marital status, and therefore, over the divorce action instituted to terminate that status. Moreover, interest analysis would suggest that that forum has a legitimate interest in the question of alimony, since that issue bears the very real potential of affecting the economic integrity of the forum's domiciliary, whether payer or recipient. That interest would appear to be sufficient to justify, in a constitutional sense, application of the forum's dispositive law[16] in determining the issue of alimony; therefore—and probably a fortiori—that interest should be deemed sufficient to justify the forum's assertion of jurisdiction over the issue. While there are some who believe that the interests sufficient to justify an assertion of jurisdiction should be greater than those required to justify imposition of the forum's dispositive law[17] and some who apparently believe that approximately equal interests would justify either,[18] it is the author's belief that the interests required to support an asserted jurisdiction need not be as great as those required to impose the forum's dispositive law. The assertion of jurisdiction merely provides a forum having the capacity to hear and determine the case. It has relatively little direct effect in determining *how* the case or any issues therein may be decided, and, to the extent that such an effect exists, it must be justified by appropriate contacts convertible into legitimate interests.[19] The

16. That such a choice-of-law resolution would be constitutionally acceptable does not mean it would be the best resolution possible. *See* text at note 53 *infra*.

17. Hanson v. Denckla, 357 U.S. 235, 253 (1958) (Warren, C.J.):

> For the purpose of applying its rule that the validity of a trust is determined by the law of the State of its creation, Florida ruled that the appointment amounted to a "republication" of the original trust instrument in Florida. For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant.

18. *Id.* at 258 (Black, J., dissenting):

> In my view it could hardly be denied that Florida had sufficient interest so that a court with jurisdiction might properly apply Florida law, if it chose, to determine whether the appointment was effectual. . . . True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations.

19. For an examination of the "conversion" process, *compare* Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963) *with* Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The conversion of "contacts" into legitimate interests in the two cases is discussed in Seidelson, *supra* note 13, at 567.

imposition of a state's dispositive law, on the other hand, necessarily will affect—in fact, determine—how the issues are to be decided. By definition, dispositive law is that law applied to dispose of or resolve a given issue. Therefore, if the forum as plaintiff's domicile has an interest in the issue of alimony sufficient to justify the imposition of its own dispositive law in resolving that issue, it should be deemed to have an interest adequate to justify asserting jurisdiction over the issue.

That same conclusion could be achieved in a number of other ways through a number of different approaches. The simultaneously determinative and enigmatic phrase created by the Supreme Court for testing the constitutional propriety of an assertion of jurisdiction over a nonresident defendant is "minimum contacts."[20] In *International Shoe,*[21] the Court said that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[22] When applied to a divorce action, the magic phrase could be so construed that the presence of the marital status within the forum state (by virtue of plaintiff's domicile there) constitutes a minimum contact between the other party to that status (nonresident defendant) and the forum state. If that construction is acceptable, the Court's classic test of in personam jurisdiction over a nonresident defendant is satisfied. *Hanson v. Denckla*[23] utilized the phrase "minimal contacts," but added its own fillip to the meaning of the phrase:

> The unilateral activity of those who claim some relationship with a nonresident defendant can not satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[24]

20. International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).
21. *Id.*
22. *Id.*
23. 357 U.S. 235 (1958).
24. *Id.* at 253.

That quoted language makes it more difficult to sustain the conclusion that a divorce-action plaintiff's domicile in the forum state provides a constitutionally permissible basis for the assertion of personal jurisdiction over the nonresident defendant. Plaintiff's acquisition of domicile within the forum could be characterized as the kind of "unilateral activity" inadequate to satisfy the requirement of minimum contacts between forum and nonresident defendant. Finding "some act by which the defendant purposefully . . . invok[es] the benefits and protections of [the forum's] laws" is an admittedly difficult chore with regard to the nonresident defendant in a divorce action. Difficult, but not impossible, especially for one determined to justify such jurisdiction.

It could be asserted that every party to a marriage enters that relationship with knowledge, actual or legally presumed, that each party to the marriage possesses the capacity to establish a separate domicile, therefore with the legal capacity to place before a court in the domicile state the marital status. Moreover, each party to the marriage (even a marriage threatened with an imminent divorce action) could have imposed upon him the legal presumption that he wished his spouse to be the beneficiary of the "benefits and protections" of the laws of any state where the spouse established domicile. An amalgam of those two conclusions or legal presumptions could support the determination that any one who enters into marriage contemplates that his spouse will enjoy the benefits and protections of the laws of the state where the spouse establishes a domicile, and therefore purposefully avails himself of the beneficence of those laws.

To the reader not wholly satisfied with that *ratio decidendi,* and troubled about the conclusion that the nonresident defendant in a divorce action has purposefully availed himself of the benefits of the laws of the state in which the plaintiff has established domicile, the author expresses sympathetic understanding. To the reader who doubts that such a defendant has even minimum contacts with the forum state, the author expresses similar consolation. In addition, to those readers the author wishes to offer an independent justification for such jurisdiction over the nonresident defendant in a divorce action.

Analogizing the marital status with a res for purposes of determining jurisdiction necessarily resulted in imposing upon divorce

actions the limitations manifested in *Pennoyer v. Neff*,[25] *Harris v. Balk*[26] and, more recently, *Seider v. Roth*.[27] Those limitations, given constitutional sanction in *Pennoyer*, were the sequelae of concepts rooted in independent sovereignty and initiation of actions by the *capias ad respondendum*.[28] Even as early as the decision in *Pennoyer* those concepts had become anachronistic. The states of the United States had not retained all of those aspects of independent sovereignty usually associated with independent nations.[29] And the *capias ad respondendum* had long before *Pennoyer* ceased being the usual mode of instituting civil actions, here and in England.[30] Yet, *Pennoyer*, by sublimating those jurisdictional limitations into due process proscriptions, gave to them a degree of permanence undeserved by contemporary facts or rational analysis. Happily, subsequent decisions have loosened the rigid strictures of *Pennoyer* in many areas where practical necessity and reasoned consideration have joined to compel a broader jurisdiction over nonresident defendants. The automobile,[31] securities sales,[32] insurance contracts[33] and a general recognition of the contribution made by each state to the general state of the union[34] have resulted in an enlarging jurisdictional basis available to the courts of the several states. In appropriate situations that jurisdiction has been found to exist even over nonresident defendants who had been afforded only a form of constructive service reasonably

25. 95 U.S. 714 (1877).

26. 198 U.S. 215 (1905).

27. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.26 99 (1966); *see* Seidelson, *Seider v. Roth, et seq.: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42 (1970). The limitations imposed in *Pennoyer, Harris* and *Seider* went to the extent of the jurisdiction available to the state courts involved in the cases. Specifically, the jurisdiction was limited to the res attached in each case: in *Pennoyer*, the land attached in Oregon; in *Harris*, the obligation attached in Maryland; and in *Seider*, the dual obligations to defend and indemnify attached in New York. Thus, although in each case the cause of action asserted was unrelated to the res attached, the effective relief which each court could accord the plaintiff was limited to the dollar value of the attached res.

28. A writ

> which commands the sheriff to *take* the defendant, and him safely keep, so that he may have his body before the court on a certain day, to *answer* the plaintiff in the action. . . . It notifies defendant to defend suit and procures his arrest until security for plaintiff's claim is furnished.

BLACK'S LAW DICTIONARY 262 (rev. 4th ed. 1968).

29. Pennoyer v. Neff, 95 U.S. 714, 722 (1877); Seidelson, *supra* note 27, at 49.

30. Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 68, 69, 98 (1968).

31. Hess v. Pawloski, 274 U.S. 352 (1927).

32. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

33. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

34. Williams v. Connolly, 227 F. Supp. 539, 546 (D. Minn. 1964).

calculated to provide actual notice of the proceedings and an opportunity to defend.[35] Surely divorce actions, involving the marital status of the litigants, and alimony orders in such actions, involving the economic integrity of the litigants, present a most appealing area for a jurisdictional basis adequate to provide certainty to the determination of the status and interstate recognition of the economic consequences of such determination. Practical necessity and reasoned consideration clamor for judicial recognition of a jurisdiction adequate to accomplish those objectives.

A further consideration suggesting the propriety of that adequate jurisdiction is a factual and legal distinction between an alimony decree entered in a divorce action and the kind of in rem jurisdiction considered by the Court in *Pennoyer*. In *Pennoyer*, the original cause of action asserted—recovery of an attorney's fee[36]—was wholly unrelated to the res attached, the Oregon land. Had the cause of action been related to the land, there is at least some question as to whether the Court's restricted view of jurisdiction would have been the same. For example, Pennsylvania has had for a number of years a statute[37] which imposes in personam jurisdiction over nonresident owners of Pennsylvania land as to causes of action arising out of that ownership. Thus, if one is injured on the land in Pennsylvania, allegedly as a result of some dangerous condition on the land, the injured party may initiate the action in a Pennsylvania court and that forum will be deemed to have in personam jurisdiction over the nonresident defendant, subject to utilization of an appropriate form of constructive service.[38] That in personam jurisdiction will enable the court to hear and determine the totality of the plaintiff's claim and to enter a judgment for plaintiff even in an amount in excess of the value of the land in Pennsylvania. Such a judgment, having an appropriate in personam jurisdictional basis, would be entitled to full faith and credit in the courts of all sister states.

Harris v. Balk, like *Pennoyer*, involved a res having no intimate relationship with the plaintiff's cause of action. The debt for which Epstein sued Balk was wholly unrelated to the debt owing

35. *See* cases cited in *supra* notes 31-33.
36. 95 U.S. at 719.
37. PA. STAT. ANN. tit. 12, § 331 (1937).
38. Rumig v. Ripley Mfg. Corp., 366 Pa. 343, 77 A.2d 360 (1951); Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (1938).

from Harris to Balk and attached by serving Harris in Maryland.[39] In *Seider v. Roth,* the dual obligations to defend and indemnify owing from the liability carrier to its nonresident insured, and providing the res,[40] were not inherently a part of the plaintiff's cause of action against the defendant-insured. It is true, of course, that in both *Harris* and *Seider* the res attached determined the dollar value of the effective relief which the forum could provide the plaintiff; but in neither case was the res an incident of the plaintiff's cause of action against the nonresident defendant.

In divorce actions, the court's determination of alimony is a determination of an economic aspect intimately related to and an incident of the marital status before the court. The issue of alimony is inherently before the court once the marital status is brought before the court. The division between res attached and cause of action asserted in *Pennoyer, Harris* and *Seider* is simply not feasible in a divorce action in which the issue of alimony is presented. The "res" which brings the cause before the court, the marital status, envelops the issue of alimony. To find appropriate jurisdiction over the former but not over the latter is incongruous. It is also the cause of the undesirable consequence of "divisible divorce." If a jurisdictional basis capable of eliminating that unwanted consequence, and, coincidentally, calculated to preclude relitigation of the forum's determination of plaintiff's domicile, thus providing certainty to the marital status, can be achieved, its

39. Harris v. Balk, 198 U.S. 215, 216 (1905). The plaintiff Epstein, a resident of Maryland, sued defendant Balk, a resident of North Carolina, in a Maryland court seeking to recover $344, allegedly owned by Balk to Epstein. The action was instituted by a writ of foreign attachment, with Harris, a North Carolina resident temporarily in Maryland, being served as garnishnee. The "property" of Balk in Harris' possession was an obligation of $180 owed by Harris to Balk. Harris admitted the obligation to Balk and, pursuant to a Maryland court order, paid the $180 to Epstein. Subsequently, Balk sued Harris in North Carolina, seeking to recover the $180 Harris had owed Balk. The Supreme Court of the United States determined that, since Maryland had acquired jurisdiction over that $180 obligation, the Maryland court order directing Harris to pay the $180 to Epstein had an appropriate jurisdictional basis and therefore was entitled to full faith and credit in North Carolina. Consequently, Balk could not recover the $180 from Harris.

40. Seider v. Roth, 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101 (1966). The plaintiffs, Mr. and Mrs. Seider, residents of New York, brought a personal injury action against defendant Lemiux, a resident of Quebec, in a New York court. The action arose out of a three-car collision which occurred in Vermont The New York action was instituted by a writ of foreign attachment, with Hartford Accident and Indemnity Company, Lemiux's liability insurance carrier, being served as garnishee. The "property" of Lemiux in Hartford's possession consisted of the dual obligations owed by the insurer to its insured to defend and indemnify. The New York Court of Appeals determined that the proceedings had given the New York court jurisdiction to the extent of the dollar limits of Lemiux's liability insurance with Hartford.

accomplishment should be facilitated. Such an accomplishment would be at least as salutary as eliminating the need for one injured by a nonresident motorist to chase the potential defendant to his home state in order to secure judicial redress and consequential economic compensation.[41] Providing certainty and appropriate finality to a judicial determination of divorce and the economic consequences of that divorce seems as much a desideratum as sparing the personal injury plaintiff a trip to nonresident defendant's home state. How can it be effected?

The method is simple. The state in which the divorce-action plaintiff is domiciled should be considered a forum having jurisdiction over the marital status and the economic incidents of that status. Assuming that the nonresident defendant is given a form of constructive service reasonably calculated to provide actual notice of the proceedings and an opportunity to defend, the forum's jurisdiction over the status and its economic incidents should be considered binding upon the defendant. Two immediate consequences would flow from that formulation of jurisdiction: (1) the forum's determination of plaintiff's domicile would be binding upon both parties to the action, and entitled to full faith and credit, and (2) the forum's determination of alimony would be binding upon both parties to the action, and entitled to full faith and credit.

The propriety of such binding effect can be determined factually by the practical opportunity afforded both litigants for a full and fair hearing on the two related questions. Perhaps one of the most frequently heard complaints about "migratory" divorces is that plaintiff's domicile in the forum state is spurious. The fictitiousness of that domicile is the product of ex parte proceedings. If only the plaintiff is present to offer evidence on the point, it is extraordinarily unlikely that that evidence will be seriously controverted. The proceedings are ex parte for one of two reasons. Either the nonresident defendant is content to have the case heard and determined by the forum selected by plaintiff, or defendant has been advised that such determination will not be given binding effect by the courts in defendant's home state or in any other state. More often than not, when defendant is content to have the case heard and determined by the forum, that content-

41. Hess v. Pawloski, 274 U.S. 352 (1927).

ment will be manifested by a formal entry of appearance by defendant. Consequently, the purely ex parte proceeding will be the result of defendant's having been advised that the forum's determinations of plaintiff's domicile (therefore its jurisdiction) and of alimony will not be binding upon defendant. Once such advice is no longer accurate, purely ex parte proceedings can be expected to be diminished substantially in number. Once the nonresident defendant is precluded legally from assuming a disinterested stance, the defendant can be expected to appear and to contest vigorously. That kind of contest necessarily will reduce the likelihood of an affirmative finding of jurisdiction where plaintiff's domicile is spurious. Therefore, that supposed evil of "migratory" divorce will be eliminated. Moreover, the potential plaintiff's expectation of a vigorous defense would have the effect of dissuading many plaintiffs from initiating truly migratory divorce actions. The result would be a substantially enhanced likelihood that divorce actions would be initiated only in states in which plaintiffs had established bona fide domiciles. That likelihood would be further enhanced by the crucible of contested litigation. Similarly, defendant's active participation in the divorce action, compelled by knowledge that the totality of the court's decree would receive full faith and credit, necessarily would produce alimony orders much more accurately reflecting the economic capacities and needs of the parties than such orders entered in ex parte proceedings.

The basic constitutional issue to be resolved in determining the propriety of such jurisdiction is whether or not it would violate the due process[42] rights of the nonresident defendant. If the issue were presented *tabula rasa,* one suspects the answer almost certainly would be that no such violation would result. After all, both litigants would be afforded the opportunity to litigate fully all relevant issues from domicile through the propriety of granting a divorce decree to the economic consequences of such a decree before a court presumably competent to hear and determine all such issues. Certainly that negates any suggestion that defendant would be deprived of liberty or property without due process of law. Yet under existing decisions of the Supreme Court such an assertion of jurisdiction over the nonresident defendant would be deemed violative of due process. The "rationale" underlying that conclusion

42. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

was set forth in *Hanson v. Denckla.*[43] After noting that "the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe Co. v. Washington,*"[44] the majority opinion cautioned that

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . .Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that state that are a prerequisite to its exercise of power over him. See *International Shoe Co. v. Washington* . . . .[45]

That quoted language suggests that if a court in State A, the state of plaintiff's domicile, hears and determines a divorce action initiated by plaintiff, granting a divorce decree and entering an order of alimony, the forum will have violated the "territorial limitations on the power of the respective States" to the extent that the forum's determinations of jurisdiction and alimony are afforded binding effect upon the nonresident defendant given constructive service. If that is so, State A is effectively precluded from conclusively determining both the marital status of its own domiciliary and the economic consequences of that status. Moreover, the state in which the other spouse is domiciled—State B—is likewise precluded from effecting such conclusive determinations as to its domiciliary, so long as the State A domiciliary avoids personal service in State B or declines to enter an appearance in the divorce proceedings instituted there.

Frankly, the author is unable to comprehend the true significance of "territorial limitations on the power of the respective States." Since each state is a member of the United States and since the *capias ad respondendum* has been passé for several hundred years, it isn't entirely clear why—separate and apart from the rigid strictures of *Pennoyer,* probably anachronistic when decided—such "territorial limitations" should exist for jurisdictional purposes. Who is intended to be protected by the limitations? If the answer

43. 357 U.S. 235 (1958).
44. *Id.* at 251.
45. *Id.*

is those not resident in the forum state, the limitations would seem to exist to protect nonresident defendants from the inconvenience of foreign litigation. While the inconvenience may be real enough, in both tangible and intangible respects, it hardly serves as an adequate justification for the limitations, for several reasons.

First, given a potential plaintiff in one state and a potential defendant in another, if the purported cause of action is ever to be heard and conclusively determined one of the parties must be subjected to the onus of foreign litigation. Why should it inevitably and invariably be the plaintiff?[46]

Second, if the inconvenience imposed on the defendant is adequately substantial and sufficiently outweighs the inconvenience which would be imposed on the plaintiff by trial in another forum—defendant's home state, for example—defendant possesses the capacity to avoid the undue inconvenience by a forum non conveniens motion.

Third, the language above excerpted from *Hanson* explicitly negates inconvenience imposed on the defendant arising from foreign litigation as the basic reason for the jurisdictional limitations prescribed. What the language fails to do is provide a persuasive alternative reason for the "territorial limitations" imposed. Indeed, that quoted phrase becomes not only the jurisdictional conclusion but the sole explanation for the conclusion. As an explanation, it is painfully inadequate.

Whatever the rationale for the "territorial limitations" may be, it is clear how those limitations operate in divorce actions. They effectively strip each of the domicile states of the respective spouses of the legal capacity to determine conclusively the marital status and the economic consequences incidental thereto of its own domiciliary. Unless and until the nonresident spouse is willing to (1) institute the divorce action in the foreign state in which defendant resides, (2) accept service of process in the foreign state in a divorce action there instituted by the resident spouse, or (3) enter a formal appearance in the foreign state in a divorce action there instituted by the resident spouse, each state can hear and determine a divorce action instituted by its own domiciliary and enter an alimony order in such action only with the knowledge

46. *See* Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) (Judge Friendly); Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQUESNE L. REV. 221 (1968).

that its alimony order will be ineffective in binding the nonresident defendant and that its divorce decree will be subject to attack by the nonresident defendant on the ground that the forum lacked jurisdiction because plaintiff was not a bona fide domiciliary of the forum state. Under existing decisions of the Supreme Court, the ultimate consequence of recognizing the legitimate interest which each state has in the marital status of its domiciliaries and in the economic consequences of that status is to preclude every state from conclusively determining the status and its economic consequences. Surely that is the least desirable jurisdictional consequence of a well founded recognition of the interest which each state has in its domiciliaries' marital status and incidental economic integrity. At best, it can be described as a Mexican stand-off—at worst, a complete frustration of the legitimate interest of each state in the marital status and economic integrity of its domiciliaries.

That legitimate interest, complemented by a common sense reading of the due process clause, leads the author to suggest that a court in a state in which one of the spouses is domiciled should be deemed to have jurisdiction over the divorce action and the economic incidents thereto, so long as the defendant has been given a form of constructive service reasonably calculated to provide actual notice of the proceeding and an opportunity to defend, and such jurisdiction is capable of withstanding a forum non conveniens motion.

That suggestion, in turn, leads to this question: Should such jurisdiction be deemed appropriate for a court sitting in a state other than the domicile of either spouse? To the extent that that assertion of jurisdiction would do no violence to, and could be exercised consistently with, the interest of each state in the marital status of its domiciliary, such jurisdiction would seem appropriate. To determine whether or not the assertion of such jurisdiction would be compatible with the legitimate interest which every state has in its domiciliaries' marital status and the economic consequences of that status requires an examination of the law which such a forum would apply in affecting the status and its economic incidents.

The essence of interest analysis in resolving choice-of-law problems is that each issue in a case should be resolved by the application of the dispositive law of that state having the dominant

interest in that issue. The technique of achieving that result exists in the fashioning of indicative laws by the forum which will refer it to the appropriate dispositive laws. The two central choice-of-law problems in a divorce action would be which state's law should determine the grounds available for divorce and which state's law should determine the availability and amount of permanent alimony.

For the dual purposes of testing the propriety of vesting jurisdiction in a non-domicile state court and of viewing the choice-of-law problems from the point of view of a "disinterested" forum, the following hypothetical case will be examined: H, a domiciliary of State A, institutes a divorce action against W, a domiciliary of State B, in a court in State F. W is given a form of constructive service consistent with due process. The grounds asserted by H are indignities to his person[47] committed by W in State C. Indignities constitute grounds for divorce in State A; they do not in States B, C or F. Assuming that the forum asserts jurisdiction, it will be confronted with this choice-of-law problem: Which state's law should be looked to in order to determine the legal sufficiency of the grounds asserted?

> The rule is . . . well established that it is the divorce statute of the forum which governs the granting of a divorce. This is true even though all the operative facts occurred in some other state. If those facts constitute grounds for divorce according to the law of the forum, the divorce may be granted. If they do not, it may not be.[48]

But why the existence of such black-letter law? The answer lies in part in an early form of interest analysis. Since it was generally assumed that the divorce-action plaintiff would be domiciled in the forum, the forum's dispositive law (statutory in this case) determined the grounds available for a divorce. After all, isn't that an appropriate manner of reacting to the forum's legitimate

47. A fairly typical legislative enactment of "indignities" as a ground for divorce may be found in Pennsylvania:

> When a marriage has been heretofore or shall hereafter be contracted and celebrated between two persons, it shall be lawful for the innocent and injured spouse to obtain a divorce from the bond of matrimony, whenever it shall be judged . . . that the other spouse:
>
> . . . .
>
> (f) Shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome . . . .

PA. STAT. ANN. tit. 23, § 10 (1929).

48. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 327 (1968).

interest in the marital status of its domiciliary? If, however, the forum is not within the state of domicile of either litigant, determining the available grounds for divorce by recourse to the forum's statutory law would be inconsistent with interest analysis. To such a disinterested forum, there would seem to be three feasible alternatives in determining which state's law should determine the availability of indignities as grounds for a divorce: the state in which defendant's conduct occurred, the state of plaintiff's domicile or the state of defendant's domicile.

Fashioning an indicative law which referred the forum to the dispositive law of the state in which defendant's conduct occurred would be justified if the forum determined that the principal reason for statutory grounds for divorce was conduct regulation. In that event, the state having the paramount interest would be the state where the undesirable activity had taken place. One could assert that such statutory grounds for divorce exist primarily for the purpose of dissuading spouses from engaging in conduct covered by the statutes. The assertion, however, lacks persuasiveness. While statutory grounds for divorce may have some such dissuasive effect, and may even have been intended by the legislature to have such an effect, it seems more likely that the dominant legislative concern in fashioning the grounds for divorce was to determine in what circumstances a domiciliary of the state should be entitled to be relieved of the matrimonial status. Presumably each legislature, in enacting the statutory grounds for divorce, was attempting to describe those situations in which divorce would be appropriate for its domiciliaries. Consequently, an indicative law fashioned by interest analysis would be more likely to refer to the dispositive law of a domicile state than to the dispositive law of the state where the defendant's conduct occurred.

That conclusion necessarily raises the next issue for interest analysis to resolve. Should the forum's indicative law refer to the dispositive law of plaintiff's domicile or of defendant's domicile? One could assert that each state has an exactly equal interest in the issue, since each state has the same legitimate interest in the marital status of its own domiciliary. Striking an even balance of interests between the "competing" states is probably the most distracting and disturbing conclusion which a forum engaged in

interest analysis can achieve.[49] It bears the potential of reducing that sophisticated method of resolving choice-of-law problems to a coin-flip. Happily, it can be avoided here neatly and legitimately.

Still assuming that each state's statutory grounds for divorce constitute a legislative manifestation of those circumstances in which a domiciliary should be able to secure relief and release from the marital status, the dispositive law of plaintiff's domicile would seem to be the appropriate law for determining the availability of any asserted grounds for a divorce. Since the plaintiff is the spouse particularly intended to be the beneficiary of legislatively enacted grounds for divorce, he is uniquely within the class of persons intended to be benefited by the statutes. Their principal purpose is to provide a way out of the marriage. By definition, it is the plaintiff who is seeking the way out. Therefore, the statutory grounds for divorce in plaintiff's domicile state should determine the availability of indignities as grounds for divorce. In the hypothetical case before the court, plaintiff is domiciled in State A and that state includes indignities within its statutory divorce grounds. Consequently, the forum should accept the grounds asserted.

If defendant should cross-claim for a divorce, the propriety and availability of the grounds asserted by her should be determined by reference to the dispositive law of State B, her domicile, for the same reasons set forth above. In her cross-claim, she is the plaintiff-equivalent seeking to utilize the way out made available by the statutes of her domicile state for the benefit of its domiciliaries.

In the plaintiff's action, the availability of defenses raises another choice-of-law problem. The forum's indicative law might refer to the dispositive law of plaintiff's domicile or of defendant's domicile. It could be asserted that defendant's domicile would be the appropriate choice since that state's law regarding available defenses was intended to protect the spouse seeking retention of the marriage. The assertion is troubling for two reasons. First, once the forum decides to utilize the law of plaintiff's domicile in determining the availability of grounds for divorce, it may be compelled to utilize the same state's law in determining the availability of defenses. For example, in the hypothetical case before the forum, indignities constitute grounds for divorce

49. Cipolla v. Shaposka, 439 Pa. 563, 573, 267 A.2d 854, 859 (1970) (dissenting opinion); Seidelson, *Comment on Cipolla v. Shaposka*, 9 DUQUESNE L. REV. 423, 427 (1971).

in plaintiff's domicile but not in defendant's domicile. Absent the grounds in defendant's domicile, there may be no applicable law to utilize in determining available defenses. Second, and less mechanical, the same reasons which suggested utilization of the dispositive law of plaintiff's domicile in determining the availability of grounds for divorce could justify reference to the dispositive law of plaintiff's domicile in determining the availability of defenses. Specifically, the forum, in fashioning its indicative law, could determine that, just as State A's statutory grounds for divorce were enacted primarily to provide a way out of the marriage for the plaintiff, so too were State A's defenses intended to provide limits to, or further describe and refine the borders of, the way out. Therefore, it would seem appropriate for the forum to utilize State A's defenses as well as its statutory grounds for divorce.

For similar reasons, assuming that defendant cross-claims for divorce, the forum should utilize the dispositive law of State B, defendant's domicile, for the purpose of determining available defenses as well as available statutory grounds.

If defendant W seeks alimony, the forum will find itself confronted with a new set of choice-of-law problems. Specifically, the forum will have to determine (1) which state's dispositive law should determine the availability of permanent alimony generally,[50] (2) which state's dispositive law should be utilized in determining the amount of permanent alimony,[51] and (3) which state's dispositive law should determine the propriety of permanent alimony if W is found to be the "guilty" party.[52]

Rather clearly, both A and B, as the respective domiciles of H and W, have legitimate interests in each of the above enumerated problems.[53] Each has the clear potential of affecting the economic integrity of each of the divorce-action litigants. It could be

50. Pennsylvania makes no provision for any permanent alimony unless the defendant spouse is insane. Hooks v. Hooks, 123 Pa. Super. 507, 187 A. 245 (1936); PA. STAT. ANN. tit. 23, § 45 (1929).

51. For examples of conflicting state laws as to the determination of the amount of permanent alimony, see CAL. CIVIL CODE tit. 6 §§ 4800-4806 (West 1969); and N.Y. DOM. RELS. LAW § 236 (McKinney 1968).

52. The author's distaste for the requirement of "guilt" in divorce proceedings was noted in Seidelson, *Systematic Marriage Investigation and Counseling in Divorce Cases: Some Reflections on Its Constitutional Propriety and General Desirability*, 36 GEO. WASH. L. REV. 60 (1967).

53. *See* text at *supra* note 16.

asserted that those interests are equal, since the concern of one state over the economic integrity of its domiciliary cannot exceed the similar concern of another state. Once again, however, that even balance of interests can be avoided properly by a more probing analysis of the interest of each state. While a permanent alimony order clearly affects the economic integrity of both payer and recipient, it may have the potential of affecting one more than the other. To the payer, it represents a diminution of the total funds he will have available for his own support. That certainly constitutes a significant impact on his economic integrity. Yet, to the recipient, the alimony order represents a sum necessary to maintain her. Since her maintenance will depend on the order, she and her domicile state would seem to have an even more significant interest in the availability of permanent alimony than would the payer and his domicile state. Consequently, in determining the general availability of permanent alimony, the forum should fashion an indicative law referring to the dispositive law of the state of domicile of the potential recipient.

The same reasoning would suggest that in determining the amount of permanent alimony the domicile state of the recipient has the paramount interest; therefore, in resolving that choice-of-law problem, the forum's indicative law should refer to the dispositive law of the recipient's domicile. Similarly, the state of the potential recipient's domicile would appear to have the dominant interest in determining the propriety of permanent alimony if W is found to be the "guilty" party. As to that issue, one could assert that H's domicile acquires an additional interest in determining if its payer-domiciliary should be required to contribute to the support of the marital malefactor. Another might assert that the state in which the allegedly wrongful conduct occurred had an interest in determining the economic sanction to be imposed on such conduct as a mode of deterrence and, therefore, conduct regulation. Yet neither of those assertions seems adequate to overcome the direct economic interest of W's domicile state. If alimony is withheld, it is that state which may be required to support or contribute to the support of its indigent domiciliary. That compelling economic interest on the part of the recipient's domicile state should be deemed greater than the interest of the payer's domicile state in shielding him from contributing to the support of the "malevolent spouse," and certainly greater than the interest

of the state where W's wrongful conduct occurred in punishing, and thereby regulating by deterrence, such conduct.

By way of review, these choice-of-law resolutions have been suggested as appropriate for the disinterested forum hearing a divorce action:

1. In determining the legal sufficiency of the divorce grounds asserted, the forum should fashion an indicative law referring to the dispositive law of plaintiff's domicile.
2. In determining the legal sufficiency of divorce grounds asserted by defendant in a cross-claim, the forum should fashion an indicative law referring to the dispositive law of defendant's domicile.
3. In determining the legal sufficiency of defenses asserted to the divorce action, the forum should fashion an indicative law referring to the dispositive law of the domicile of the party seeking the divorce.
4. In determining the availability of permanent alimony generally, the forum should fashion an indicative law referring to the dispositive law of the domicile of the potential recipient.
5. In determining the amount of permanent alimony, the forum should fashion an indicative law referring to the dispositive law of the domicile of the potential recipient.
6. In determining the propriety of permanent alimony if the potential recipient is the "guilty" party, the forum should fashion an indicative law referring to the dispositive law of the domicile of the potential recipient.

It will be noted that, as to each of the choice-of-law problems considered, that dispositive law to be applied is of the state having a legitimate interest in the particular issue, and, assuming the propriety of the conclusions achieved, the state having the most significant interest in each such issue. The reader will recall that the forum in the hypothetical case considered was "disinterested," in the sense that it was not within the domicile state of either litigant. It would seem, then, that affording divorce jurisdiction to a court in some state other than the domicile state of the plaintiff does no violence to the legitimate interests which the "competing" states have in the various issues involved in such

litigation. Interest analysis assures that those interests will be recognized and analyzed by the forum as a condition precedent to the fashioning of indicative laws which will refer the forum to the appropriate dispositive laws. That assurance suggests the propriety of extending to any court jurisdiction to hear and determine an action for divorce and alimony, so long as the nonresident defendant is provided a form of constructive service reasonably calculated to give actual notice of the proceeding and an opportunity to defend, and plaintiff's selection of a forum is able to withstand a forum non conveniens motion. The legitimate interests of the states involved are accorded appropriate protection and recognition even though the forum is not within the state of plaintiff's domicile.

Another aspect of the choice-of-law resolutions suggested should be examined to determine their propriety. What would be the functional effect of such resolutions, in terms of discouraging "migratory" divorce actions—using that phrase in its worst sense? By determining the availability of the grounds for divorce asserted and defenses thereto by reference to the dispositive law of plaintiff's domicile, the forum would discourage the plaintiff from forum-shopping for that state having the most compatible statutory grounds for divorce. By determining the general availability of alimony, the amount of alimony and the propriety of alimony for the "guilty" spouse by reference to the dispositive law of the domicile of the potential recipient, the forum would discourage the plaintiff from forum-shopping for that state having the most compatible law regarding alimony.

Such interest analysis by the forum, then, would serve two desirable and related purposes: it would assure appropriate recognition of the legitimate interests of the states involved and it would dissuade divorce-action plaintiffs from seeking "divorce-haven" forums. Since both of those purposes would be served through interest analysis, utilized even by a disinterested forum, the enlarged jurisdiction suggested earlier in this article seems to be further justified. That enlarged jurisdiction would do no violence to the interests of the concerned states and would deter divorce-action plaintiffs from the most undesirable mode of forum-shopping. Simultaneously, it would eliminate the two most undesirable consequences of presently existing limitations on divorce jurisdic-

tion: "divisible divorce" and the lack of certainty and finality of a divorce decree.

It is suggested that a combination of interest analysis in divorce actions and an enlarged concept of the divorce-action jurisdiction available to courts would improve substantially the existing state of the law regarding divorce litigation. It remains only for a court to engage in the enterprise.